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In the Supreme Court of the United States

October Term, 2001

JAMES EDWARD PRICE, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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11 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENTS

I. CERTIORARI SHOULD BE GRANTED TO CORRECT THE ERROR THAT THE GOVERNMENT NOW CONCEDES OCCURRED. (Responsive to Gov't Br. 10–13.) 2

II. THE GOVERNMENT'S LACK-OF-PREJUDICE ARGUMENT MUST BE REJECTED. (Responsive to Gov't Br. 13–16.) 4

CONCLUSION 8

TABLE OF AUTHORITIES

Page

Cases

Lawrence ex rel. Lawrence v. Chater,
516 U.S. 163 (1996) 4–5, 7

Netherland v. Tuggle,
515 U.S. 951 (1995) 3

Strickland v. Washington,
466 U.S. 668 (1984) 4

United States v. LaBonte,
520 U.S. 751 (1997) 1, 3, 6

United States v. Powell,
469 U.S. 57 (1984) 5

United States v. Reyes,
102 F.3d 1361 (5th Cir. 1996) 6

United States v. Solomon,
29 F.3d 961 (5th Cir. 1994) 6

Statutes

18 U.S.C. § 924(c) 1, 2, 3, 6, 7

18 U.S.C. § 924(c)(1)(A) 3

21 U.S.C. § 841 . . . . . 1, 5

21 U.S.C. § 851(a) 1, 3, 4

Rules

Fifth Circuit Rule 47.5.4 4

Supreme Court Rule 15.6 1

Pursuant to Supreme Court Rule 15.6, Petitioner James Edward Price files this Reply to the Brief for the United States in Opposition to his petition for writ of certiorari.

INTRODUCTION

Price petitions for certiorari because the Fifth Circuit's ruling that he faced an enhanced statutory maximum on his simple drug possession conviction conflicts with this Court's decision in *United States v. LaBonte*, 520 U.S. 751 (1997). The ruling that Price faced the enhanced maximum converted Price's simple possession offense from a misdemeanor to a felony, permitting his conviction for carrying a firearm during a drug felony to stand under 18 U.S.C. § 924(c).[1]

The Government concedes that, under *LaBonte*, "petitioner's drug possession offense could not be treated as a felony . . . given the government's failure to file a notice of enhancement under 21 U.S.C. § 851(a)." Gov't Br. 13. It also concedes that the Fifth Circuit's "reasoning is incorrect," and "that, in the absence of a proper notice under 21 U.S.C. 851(a), [Price's] drug possession offense did not qualify as a felony for the purposes of Section 924(c)." *Id.* 10–11. It finally concedes that, "[b]ecause no such notice was filed in this case, the court of appeals erred in concluding that petitioner's drug possession offense qualified as a predicate felony under Section 924(c)." *Id.* 12.

1. Price was charged with possession of cocaine base with intent to distribute, under 21 U.S.C. § 841, and carrying a firearm during that drug felony, under 18 U.S.C. § 924(c). He was acquitted of the distribution charge, found guilty of simple possession, and found guilty of the firearm count. Pet. for Cert., App. A at 1–2.

Despite these concessions, the Government argues that no further review is warranted because the Fifth Circuit's opinion lacks precedential effect. This argument should be rejected. The Government's concession of error before this Court is a recognized and equitable reason for granting certiorari, vacating judgment, and remanding for further consideration, regardless of the decision's precedential value.

The Government also argues against further review because Price cannot show prejudice. Gov't Br. 14. According to the Government, no prejudice exists because there is no reasonable probability that a rational jury would have failed to find Price possessed cocaine base with intent to distribute—an offense that would support a § 924(c) conviction. *Id.* Price replies that this argument ignores that Price's jury acquitted him of this very charge. Given the jury's acquittal on the possession-with-intent-to-distribute charge, the Government's theory that there was no prejudice must be rejected.

For all these reasons, the Court should grant certiorari to correct the error that the Government now concedes occurred.

ARGUMENTS

I. CERTIORARI SHOULD BE GRANTED TO CORRECT THE ERROR THAT THE GOVERNMENT NOW CONCEDES OCCURRED. (Responsive to Gov't Br. 10–13.)

Although the Government initially argued that the Fifth Circuit's decision was correct,[2] it now concedes that the court of appeals' "reasoning

2. The Government asserts that it "did not defend the reasoning of the court of appeals," in its response to Price's petition for rehearing in the Fifth Circuit. Gov't Br. 10 n.6. The Government is mistaken. In its response, the Government argued that the Fifth Circuit "correctly stated that, in the hypothetical realm, had

(continued...)

is incorrect." Gov't Br. 11. Under *LaBonte*, Price's "drug possession offense could not be treated as a felony[.]" Gov't Br. 13 (citing 520 U.S. at 760). Consequently, that offense "did not qualify as a felony for purposes of Section 924(c)." Gov't Br. 11. And, "the court of appeals erred in concluding that petitioner's drug possession offense qualified as a predicate felony under Section 924(c)." *Id.* 12. This confession of error in the Fifth Circuit's decision is a ground for granting certiorari, vacating the judgment, and remanding for reconsideration of *LaBonte*'s effect on the Fifth Circuit's ruling. *See Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167–68, 172 (1996) (confession of error in court of appeals' decision ground for GVR).

Indeed, a "GVR order" is particularly appropriate for flagging an issue that the court of appeals appears not to have fully considered. *Lawrence*, 516 U.S. at 167; *cf. Netherland v. Tuggle*, 515 U.S. 951 (1995) (vacating stay order for probable failure to apply 12-year-old Supreme Court precedent). As the Fifth Circuit did not mention *LaBonte* in making its ruling, and as that ruling conflicts with *LaBonte*, it is likely that the court of appeals overlooked the significance of this case and the issue it presented

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2. (...continued)
Price been correctly sentenced under § 844, the sentencing court could have noted his two prior drug convictions, imposed a sentence of either two or three years, and thus, his drug possession would have been rendered a drug-possession felony under § 924(c)(1)." Gov't Reh. Resp. 8. And, it dismissed as "without merit" Price's complaint that the lack of a § 851 enhancement notice "renders the possibility of a § 851 enhancement improper." *Id.*

in Price's appeal.[3] Regardless of the precedential significance of the Fifth Circuit's decision in Price's case,[4] this Court should exercise its discretion to grant a GVR order because the Government's concession casts substantial doubt on the correctness of the court of appeals' decision. *See Lawrence*, 516 U.S. at 170 (finding GVR appropriate when recent events cast substantial doubt on correctness of lower court's disposition).

II. THE GOVERNMENT'S LACK-OF-PREJUDICE ARGUMENT MUST BE REJECTED. (Responsive to Gov't Br. 13–16.)

The Government argues that Price is "not entitled to relief on his claim of ineffective assistance of counsel because, even assuming deficient performance by counsel . . . petitioner cannot show prejudice: there is no reasonable probability that a rational jury would have failed to find that he possessed the cocaine base with the intent to distribute." Gov't Br. 11; *see Strickland v. Washington*, 466 U.S. 668, 694 (1984) (prejudice shown if reasonable probability that result of the proceeding would have been different). Possession with intent to distribute is a felony that could

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3. The Government notes that Price raised the absence of a § 851 enhancement notice for the first time in his petition for rehearing. Gov't Br. 10 n.6. That is because neither party briefed the issue on appeal. Reh. Pet. 1. The law prohibited recidivist enhancement of Price's simple possession offense in the absence of an enhancement notice, and there was no reason to anticipate that the court of appeals would decide Price's case based on the possibility of an enhancement that the law forbade. The rehearing petition was filed precisely because the Fifth Circuit overlooked the applicable law, and the fact that no enhancement had been filed. *Id.* 1–2. Had the Government conceded then—as it concedes now—that no enhancement was possible, the outcome of Price's appeal likely would have been different.

4. Under Fifth Circuit local rules, an unpublished opinion is not precedent, but may be persuasive authority. 5TH CIR. R. 47.5.4.

theoretically support a § 942(c) conviction. *See* 21 U.S.C. § 841 (possession with intent to distribute punishable by more than one year).

The Government's argument must be rejected, given that the jury at Price's trial actually did acquit him of possessing cocaine base with intent to distribute. Price's indictment charged him with possession of cocaine base with intent to distribute. App. A at 1–2. The jury acquitted him of that offense, but convicted him of the offense of simple possession of a controlled substance. *Id.* at 2. The fact that a jury did acquit Price of possession with intent to distribute shows that there is at least a reasonable probability that such acquittal could occur, and thus defeats the Government's lack-of-prejudice argument.

Seeking to avoid this obvious conclusion, the Government contends that "[i]t is immaterial that the jury chose not to find petitioner guilty on the separate charge of possession with intent to distribute; juries are entitled to render compromise verdicts[.]" Gov't Br. 15 (citing, inter alia, *United States v. Powell*, 469 U.S. 57 (1984)). But the law governing compromise verdicts assumes that the jury rendering such verdicts was correctly instructed to begin with. *See Powell*, 469 U.S. at 66 (jurors expected to follow law as charged).[5]

5. If a jury is correctly instructed, but nonetheless returns inconsistent verdicts, the verdicts will be viewed as a jury compromise that will not be disturbed on appeal. *See Powell*, 469 U.S. at 65 (noting that inconsistent verdicts occur when jury fails to follow court's instructions). If the jury was not correctly instructed, it cannot be assumed that a compromise verdict was rendered.

The jury was not correctly instructed at Price's trial.[6] The indictment charged Price with violating 18 U.S.C. § 924(c) by using or carrying a firearm during a specific drug-trafficking offense, "to wit: Possession with Intent to Distribute cocaine base." However, the district court's jury instructions permitted the jury to convict Price for using or carrying a firearm during a different predicate offense, possession of over 5 grams of cocaine base. *United States v. Price*, No. 00-51078, Defendant-Appellant's Br. 17–20 (May 11, 2001). Under Fifth Circuit law, those instructions constructively amended the indictment. *United States v. Reyes*, 102 F.3d 1361, 1364–65 (5th Cir. 1996). In the Fifth Circuit, this was reversible error. *United States v. Solomon*, 29 F.3d 961, 964–65 (5th Cir. 1994). Thus, Price argued on appeal that counsel was ineffective for failing to object to the jury instruction on the § 924(c) offense that constructively amended the indictment.[7]

The Fifth Circuit avoided deciding the jury instruction issue by finding that Price's § 924(c) conviction could be upheld on the alternative ground that his simple drug possession offense was enhanceable as felony. Pet. for Cert., App. A (no mention of jury instruction argument). But—as the Government now concedes—*LaBonte*'s reasoning precluded Price's simple possession offense from being treated as a felony. Gov't Br. 13 (citing 520 U.S. at 760).

6. See *United States v. Price*, No. 00-51078, Defendant-Appellant's Br. 17–24 (May 11, 2001), and Defendant-Appellant's Reply Br. 9–14 (July 9, 2001).

7. *Id.*

Given the Fifth Circuit's clear precedent requiring reversal for the type of constructive amendment that occurred in Price's case, it is likely that Price would have prevailed on his ineffective-assistance-of-counsel claim if the court of appeals had not found an alternative, albeit incorrect, ground for affirming the § 924(c) conviction. This is an additional reason for issuing a GVR order in Price's case. A GVR order may be issued "on the basis of a *reasonable probability* that giving the lower court the opportunity to consider that point anew will alter the result." *Lawrence*, 516 U.S. at 171–72 (emphasis in original). As the Government concedes, the Fifth Circuit cannot uphold Price's § 924(c) conviction on the theory it relied upon in its opinion. Giving the court an opportunity to consider this point anew will likely alter the result of Price's appeal.

CONCLUSION

FOR THESE REASONS, and for the reasons set out in Price's petition, the Court should grant certiorari, vacate the judgment, and remand for further consideration.

Respectfully submitted.

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